No. 20,770

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED SHOPPERS EXCLUSIVE, a California corporation; MANFREE, INC., a California corporation,

Appellants,

vs.

GENERAL ELECTRIC COMPANY, a New York corporation, et al.,

Appellees.

Appeal from the United States District Court for the Northern District of California

REPLY BRIEF OF APPELLANTS

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Subject Index

Table of Authorities Cited

Codes

Rules

Statutes

Texts

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The various opening briefs of the appellees[1] each totally ignore the controlling rule in nonsuit cases: all inferences from the evidence are to be construed in favor of the party against whom the motion for

[1]Appellants will hereinafter refer to the separate opening briefs of the appellees as follows: General Electric Company (G.E. Br.); Borg-Warner Corporation and Norge Sales Corporation (B.W. Br.); California Electric Supply Company (Cal. El. Br.); Radio Corporation of America (R.C.A. Br.); Whirlpool Corporation (W.P. Br.); Maytag Company and Maytag West Coast Company (M.T. Br.); General Motors Corporation and Frigidaire Sales Corporation (Frig. Br.).

a directed verdict is made. *Continental Ore Co. v. Union Carbide Corp.,* 370 U.S. 690, 696 (1962). Instead, in their arguments, the appellees arrogate to themselves the function of the trier of fact. From such an improper position, they recite as "fact" to this Court matters which the evidence, or reasonable inferences to be drawn from the evidence, disclose to be untrue.

Interestingly and significantly, the appellees either ignore (or attempt to dismiss lightly) the evidence summarized at pages 89 to 94 of Appellants' Opening Brief (App. O.B.). This fundamental evidence, demonstrating why appellants' case should have been permitted to go to the jury, is analyzed below, noting the reasonable inferences the trier of fact could draw from it. In contrast, it is also pointed out how the appellees either ignore this proof of antitrust violations, or state conclusions they have drawn which are contradicted by appellants' evidence.

I. THE EVIDENCE OFFERED BY APPELLANTS WAS SUFFICIENT FOR THEIR CASE TO GO TO THE JURY

1. The suppliers of twelve leading brands of major appliances and/or television sets refused to deal with Manfree

This basic circumstance is either admitted, or ignored and thus admitted by implication, in the briefs of appellees Frigidaire, G.E., Borg-Warner, R.C.A. and Whirlpool. (See, e.g., Frig. Br., pp. 5-6; G.E. Br., pp. 24-25; B.W. Br., pp 14, 26, 29-30; R.C.A Br., pp. 5, 10; W.P. Br., pp. 5, 11-15, 18.) Maytag West Coast admits its refusal to deal (M.T. Br., p. 4), but then

argues at length concerning its alleged justification for doing so. Only California Electric denies a refusal to continue to deal with Manfree. (Cal. El. Br., pp. 7-14.) In so doing it ignores the testimony of Mr. Bernard Freeman, an officer of Manfree, concerning appellants' experiences with this vendor and its failure to enter into commercial arrangements despite a succession of requests. (See App. O.B., pp. 41-44, 55-56, and 75-76.)

2. Some suppliers did sell to Manfree for periods of time, but subsequently they all refused to continue to deal with Manfree

The probative effect of a series of cutoffs by major suppliers, one by one, is ignored, by all appellees, excepting California Electric. (Cal. El. Br., pp. 11-12.)

3. Statements by representatives of suppliers at times of refusals to deal with Manfree

a. *Jack Mitchell conversation:* Mr. Freeman of Manfree testified that Mr. Jack Mitchell, a representative of co-conspirator W. J. Lancaster Co., told him in 1957 that Lancaster had been subjected to pressure from representatives of co-conspirator Hale not to sell to Manfree; that Lancaster held a meeting to discuss that situation; then Lancaster's management decided under such circumstances not to sell to Manfree any longer. (Tr. 5808-5809.) But this testimony is ignored by all appellees' briefs, except those of Frigidaire and Borg-Warner. They urge that the reason for the refusal of distributor Lancaster to deal with Manfree was because of its so-called "bait and switch" advertising. (B.W. Br., pp. 13-14; Frig. Br., p. 29.)

However, on a motion for a directed verdict it should be assumed true that the reason why Lancaster refused to further deal with Manfree was, as its sales representative said, because of pressure from Hale. Appellees cannot adopt an inconsistent and contrary position to the testimony of Mr. Bernard Freeman. That testimony was admitted by the trial Court to establish the conspiracy, and is a major part of the sum total of evidence proving the existence of a conspiracy to boycott appellants. Mr. Mitchell was given authority by Lancaster to see Manfree's representatives and inform them of the refusal to deal. (Tr. 2594.) Cf. *Flintkote Company v. Lysfjord,* 246 F.2d 368, 384-385 (9th Cir. 1957). Borg-Warner argues that it is prejudicial error to have allowed the testimony into evidence. (B.W. Br., pp. 37-40.) Clearly, Mr. Mitchell's statements to Mr. Bernard Freeman of Manfree was properly admissible in evidence under this Court's ruling in *Esco Corporation v. United States,* 340 F.2d 1000, 1007, 1009-1013 (9th Cir. 1965). Borg-Warner argues (B.W. Br., pp. 38-39) the conversation between Mr. Mitchell and Mr. Freeman is analogous to the testimony of Mr. Lysfjord as to what Mr. Krause, a co-conspirator, told him on the telephone in *Flintkote Company v. Lysfjord, supra* at p. 386. But the Krause, Lysfjord conversation took place after the severance of relations between Flintkote and the plaintiffs, and after the conspiracy was found by the Court to have ended. (246 F.2d 381.) Here the statement of Mr. Mitchell explained Lancaster's refusal to deal and was part of the res gestae. In *Flintkote,* further, there was no

evidence showing that Coast Insulating Products (Mr. Krause's employer), was affiliated with defendant Flintkote Company, other than through the conspiracy. Here there is independent evidence that Lancaster was an agent of Borg-Warner in the advertising, promotion and sale of Borg-Warner's Norge products: the evidence showed meetings between Mr. Bull of Norge Sales, Mr. W. J. Lancaster and Gilbert Freeman of Lancaster and Ed Bonnet of Graybar, Los Angeles, at the Villa Hotel, San Mateo, in April 1959 (App. O.B., pp. 51-52), and that Borg-Warner/Norge Sales[2] controlled the disbursement of advertising funds to retailers. (Pl. Ex. Nos. 46-48, 644, 4098, B, G, H, 4099, 4101 A to K, 4102, 4055 (Court Ex. No. 1), 4357, 4351-4353, 4359-1.)

Borg-Warner clearly cannot enter into, as it did, extensive local advertising and promotional arrangements with its distributor, funding the distributor with a 100% subsidy for local advertising costs to be allocated to the key retailers Hales and Macys under the distributor's supervision, and then claim that

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[2]Appellees Borg-Warner and Norge Sales strain mightily (B.W. Br. pp. 8-10) to establish here what they utterly failed to do in the trial court: that Borg-Warner and Norge Sales are unrelated, independent companies. They admit "Norge Division" was part of Borg-Warner (B.W. Br. p. 8), that Judson Sayre was president of Norge Division as well as Norge Sales (Tr. 2502), but then claim he was not a "corporate officer" of Borg-Warner! *(Ibid.)* (See Tr. 2493-2494). These "separate entities" had common officers (Tr. 2494-2501, 2525), common office locations (Tr. 2502-2510), common financial and sales planning (Tr. 2494-2499, 2514-2520), interconnected financing (Tr. 2530-2532). The trial Court expressly found this "contention . . ." of a ". . . separate corporate entity", from the wealth of evidence to the contrary, was a proper jury question (R. 1962). See, also, the trial Court's comments on the particular issue during trial (Tr. 2946-2951).

the distributor is not its agent in the local market. (See testimony of Gil Freeman, Tr. 2677, 2680, 2682-2688.) "The existence of an agency is a question of fact (Brokaw v. Black-Foxe Military Institute, 37 Cal. 2d 274, 278 . . .) which may be implied from the conduct of the parties. Smith v. Schuttpelz, 1 Cal. 2d 158, 161 . . .". *Thayer v. Pacific Elec. Ry. Co.,* 55 C. 2d 430, 438 (1961). The agency relationship may be established by circumstantial evidence; for this purpose all evidence about the relation of the parties casting light on the character of their relationship is admissible. *Bergtholdt v. Porter Bros. Co.,* 114 Cal. 681, 688 (1896). See *Rest., Agency* (2d), Section 14 N (1958). The evidence noted above establishes existence of an agency in this case.

It is respectfully urged that in considering appellees' motions for a directed verdict, it must be taken as true that the reason for Manfree's cancellation with respect to the Norge line was because Hale told Lancaster that it could no longer sell to Manfree and Hale at the same time, and that under this pressure co-conspirator Lancaster decided not to sell to Manfree.[3]

b. *John Muntain conversation:* California Electric sales representative Mr. John Muntain told Mr. Bernard Freeman in September, 1958, that his company ceased selling Philco appliances to Manfree be-

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[3]It is important to note that Gil Freeman, who testified it was decided to cut off Manfree because of appellants' advertising (B.W. Br. p. 14), testified that he *never* mentioned such advertising to appellants, or discussed it with them, or even told them what was objectionable (Tr. 2887-2890).

cause of pressure upon California Electric from other San Francisco retail stores not to continue to do so.

This testimony is ignored by the appellees, with the exception of California Electric (Cal. El. Br., pp. 11-12) and Frigidaire (Frig. Br., p. 29). California Electric quotes *verbatim* the testimony of Mr. Freeman concerning Muntain's statement to him (Tr. 5736-5737), but asks this Court to draw different inferences from the testimony (Cal. El. Br., pp. 11-12). In so doing, it ignores the ruling of this Court in *Girardi v. Gates Rubber Co. Sales Division, Inc.*, 325 F. 2d 196, 200-201 (9th Cir. 1963) where it was specifically held that a letter referring to "stocking jobbers" as a general class of merchants who were upset over price-cutting, permitted the inference that plaintiff's competitor was one of the complaining jobbers. By analogy, the jury could reasonably infer from the testimony of Mr. Bernard Freeman that the "other stores" referred to by Muntain meant the large local "key" accounts, such as co-conspirator Hale. It could further reject the interested testimony of Mr. Muntain that he couldn't recall this conversation (Cal. El. Br., p. 11), and that Manfree was not interested in obtaining Philco appliances from his company, especially when the record showed that Mr. Valenson of California Electric told Mr. Freeman that Muntain had lied in his [deposition] testimony. (Tr. 5862-5863.)

c. *William Mayben conversation:* Co-conspirator Graybar's representative, Mr. W. H. Mayben, told Mr. Freeman in October 1958, that Graybar (local

Hotpoint distributor) would be unable to sell to department or other stores, so long as it was selling to discount stores, and that therefore Graybar would no longer sell Hotpoint appliances to Manfree (App. O. B., pp. 45-46).

Appellees ignore this testimony, including appellee Hotpoint. It discusses (G.E. Br., pp. 22-23) its version of the circumstances of Graybar's termination of the Manfree franchise, but it ignores entirely the direct evidence that a representative of its local marketing agent, Graybar, told Mr. Freeman that Graybar would be unable to sell to department stories if it sold to discount stores, and therefore Graybar would no longer sell Hotpoint appliances to Manfree. Appellees no doubt intentionally sidestepped this evidence because it was directly corroborated by the testimony of Mr. Vern Brown (Tr. 6120-6125).

d. *Cancellation of Manfree's franchise by Maytag:* Manfree's franchise was cancelled by Maytag West Coast on March 10, 1959, immediately following a period in which Hale would not buy or advertise Maytag products. Almost coincidental in time with Manfree's cancellation, Maytag sold $11,000 in Maytag appliances to Hale (App. O.B., pp. 46-47). This fact is admitted by the appellees, as it cannot be denied.

Maytag takes the position that the Court should adopt its arguments as to what inferences should be drawn from this fact (M.T. Br., pp. 26-27). But clearly the trier of fact is to draw the conclusions from unusual circumstances such as disclosed by this

large purchase order. The cases cited by Maytag (M. T. Br., pp. 26-27) are beside the point. Appellants do not argue that Manfree's right to Maytag goods depends upon dealer tenure. It does argue that it is unlawful to deny products to it pursuant to a boycott conspiracy, *United States v. General Motors Corp.*, 384 U.S. 127, 141-143 (1966), and, this circumstance is indicative of competing retailer pressure upon Maytag. Indeed, the arguments advanced by Maytag are shown to be incorrect. Thus it argues (M.T. Br., p. 6) that other dealers were not renewed at the same time that Manfree was disenfranchised. It mentions Lachman Bros., Sterling and Redlick's. But Pl. Ex. No. 318 shows that Sterling was franchised by Maytag on October 14, 1959; Pl. Ex. 325 shows that Redlick's was franchised May 25, 1959 (see Tr. 3334-3335), and Pl. Ex. No. 641 shows sales by Maytag West Coast to Lachman Bros. in 1960. Thus the retail accounts mentioned as having been cancelled by Maytag along with Manfree, were all allowed to acquire Maytag appliances and did so, with the exception of Manfree.

Frigidaire (Frig. Br., p. 29) adopts the arguments of Maytag, and completely ignores the legal principle that the jury is the only body to draw the inferences from the evidence.

e. *Cancellation of shipments from Graybar in Los Angeles:* Graybar's Los Angeles outlet refused to continue to ship Norge appliances to Manfree, because Borg-Warner and Lancaster requested it not to sell in Lancaster's "territory".

This evidence is ignored by the appellees, with the exception of Borg-Warner, which spends considerable length arguing what the jury should find to be the significance of the Villa Hotel meeting (B.W. Br., pp. 43-47). Clearly, the jury is entitled to find that the purpose of this meeting was to insure, at Hale's request, that discount stores not be supplied Norge appliances in San Francisco County.[4] There was direct testimony by Mr. Gil Freeman that he asked Mr. Bonnet, in the presence of Mr. Bull, an officer of Norge Sales (Tr. 5365, 5383-5384) not to sell or transship Norge appliances into San Francisco (Tr. 2592)

The fiction that this meeting was designed to settle warranty obligations is dispelled by Bonnet's letter (Pl. Ex. No. 4023). He there indicates that he considers the whole affair to be unfair, penalizing Graybar for transshipping into another distributor's territory. Pl. Ex. No. 4029 shows how important the transshipping was to Norge who otherwise pretends a manufacturer's disinterest in local retailing.

4. Evidence of conspiracy from common refusals to deal

Seven lines of television sets, comprising virtually all of the leading brands, were denied to Manfree

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[4]There was extensive evidence, pointedly ignored or demeaned by appellees, of meetings between officers of Norge Division, and Norge Sales, and representatives of distributors (including Lancaster) and retailers (including Hale) at trade shows and elsewhere (Tr. 510-513, 521-523, 529-538, 545-547, 1371-1374, 1400-1405, 2358-2360, 2362-2365, 2682-2688 [after impeachment of Gil Freeman], 2758-2764, 2825-2826, 2914-2918, 2963-2964, 5387-5389). Similarly, it is undisputed that Hale was a "key dealer" for Norge in the San Francisco County market (Pl. Ex. Nos. 4098, 4099; Tr. 2374-2375, 2669-2673, 2697-2700, 2745-2750, 2758-2764).

during the period of 1957 to 1964, i.e., R.C.A., Philco, G.E., Motorola, Westinghouse, Zenith and Sylvania (1958-1963). Similarly, the leading brands of major appliances, i.e., G.E., Philco, Norge, Maytag, Whirlpool, Hotpoint, Frigidaire and Westinghouse, were denied to Manfree during the same period, except for a limited period when some of these brands were sold to appellants on a "no-name/no-price" advertising basis only (Tr. 5725; offer of proof at Tr. 5783-5784).

The appellees argue that no adverse inferences to them may be drawn from these circumstances, stating that there is no "conscious parallelism" due to the fact that all refusals to (continue to) deal did not take place on the same day, that the length of time involved indicates unrelated action, and that the various vendors all had different reasons. But the facts show that Manfree did not have any of the leading brands of television sets available to it in competition with the major retailers of television sets in San Francisco County, and, after April 1959 none of the leading brands of major household appliances. There was parallelism in the common refusals to deal all through this period of time, in the fact that Manfree lost its suppliers one by one, and in the fact that it was unable to acquire these lines. As indicated above, there were conscious refusals to deal by competitors in an over supply market. The defendants here are asking this Court to do precisely what the plaintiff in *Theatre Enterprises v. Paramount Film D. Corp.,* 346 U.S. 537 (1953), asked the Supreme Court to do: rule that inferences stemming from a refusal to deal by com-

petitors require a directed verdict. The Supreme Court held that such inferences were a question of fact for the jury, and that it would be error to hold as a matter of law that such refusals to deal constituted an agreement, it being up to the jury to determine from the evidence whether an agreement to boycott existed. Appellees therefore ask this Court to do exactly what the Supreme Court ruled against (only in the context of a plaintiff's argument in that case).

5. Appellants' letters to vendors requesting product

In June and July of 1960, the vendor appellees and co-conspirators all received letters from Manfree urgently requesting the right to purchase the lines they sold, but they uniformly refused to deal with appellant in spite of what was a reasonable request that Manfree be franchised and allowed to carry such lines. Refusals to deal by appellees and others continued through August, 1964 (when the second complaint was filed).

Appellees argue that these letters were manufactured by an attorney, and Borg-Warner attacks the good faith of these letters (B.W. Br., p. 33, n. 32). The answer to Borg-Warner's allegation is that Manfree in 1959 ordered carload lots of Norge merchandise from the Los Angeles territory, indicating that it indeed was willing to acquire Norge merchandise in carload lots (Pl. Ex. No. 4019.) Further, arguments as to the good faith of the letters, or the fact that they were written on the advice of counsel, are properly addressed to a jury, not to this Court.

Such arguments concerning letter requests as a matter of law have been resoundingly answered by this Court as in *Standard Oil Co. of California v. Moore,* 251 F.2d 188 (9th Cir. 1957).

6. Alleged reasons for refusals to deal

The companies that refused to deal with Manfree, when asked to do so, could offer no convincing reasons for the refusal to deal. They only claim that such decisions were based on some ethereal, general "policy" grounds. Maytag and California Electric attempted to show more specific reasons; however, such "reasons" once again only presented the issue of "who (what) do you believe" for the trier of fact.

The manufacturer appellees answer this statement by claiming that their distribution arrangements provided that they do not sell to retailers. This defense will not support or justify a refusal to sell which supports a conspiracy to boycott. *Klor's, Inc. v. Broadway Hale's Stores, Inc.,* 359 U.S. 207 (1959). Nor may the manufacturer appellees refuse to sell to retailers in support of a geographical territorial limitation which prevents competition among distributors. *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 378-379 (1967). Nor may these refusals to sell be pursuant to a program and plan among manufacturers to establish a fixed and rigid distribution system as to television sets and major appliances in the United States, and not be illegal (*Ibid*). It is for the jury to conclude, based upon all the facts and evidence, whether or not these manufacturer appellees were

directly supporting a conspiracy to boycott in San Francisco County. Illustrative of that evidence applicable to the manufacturers is the following:

Appellee Borg-Warner (through Norge Sales) was shown to be directly involved in a boycott of appellants, by attendance of Norge Sales representatives at the hotel meeting in San Mateo, and in its refusals to permit sales to Mr. Green as agent for U.S.E. in Los Angeles.[5] Graybar was shown to discuss the franchising of discount stores with Hotpoint (Pl. Ex. No. 482). Hale entered into direct discussions with representatives of R.C.A. and Whirlpool in which Hale made known its need for a minimum 30% markup on appliances (Pl. Ex. Nos. 349, 350; Tr. 270-271).

The jury could find from evidence of the trade customs and practices followed by R.C.A., that it had full knowledge of the coercive price policy imposed on local retailers by its distributor, A. H. Meyer Co. R.C.A. had complete control over the manner in which its advertising funds were being utilized in the local market. It employed field sales representatives whose duty was to confer with and discuss sales matters with distributors; these representatives met with distributor representatives several times a month (Tr. 1215-1217, 1307-1308, 4689, 4732-4736, 4749-4751, 4766), and periodically called upon local retailers (Tr.

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[5]As to appellees' contention (B.W. Br. p. 46) that there was *no* evidence that Green was cut-off as U.S.E.'s buying agent for Norge products, there is Green's stricken testimony that Bonnet of Graybar refused further orders and threatened to take Green's company ". . . off the list too" if he persisted (Tr. 5515-5519).

1307-1308, 1914-1916, 4693-4696, 4699-4700, 4708, 4768, 4769, 4819). R.C.A. held regional trade shows for distributors once or twice a year, attended by representatives of Meyer, and held national trade shows, where its officials met with distributor and (upon occasion) retailer representatives. (Tr. 510-513, 545-547, 551-558, 4682-4686, 4782, 4797-4798, 4860-4861.) They also attended distributor trade shows. (Tr. 557-558, 1914, 1238-1240, 4701, 4814.) They discussed local problem with retailers, in direct meetings with them. (Pl. Ex. Nos. 349 and 350; Tr. 222-259.) It advertised directly in the local market. It authorized Hale a special 60% for unverified advertising costs although its policy statements provided for 50% maximum. (Pl. Ex. Nos. 1846; 99.)

Whirlpool had direct contacts with Hale (above, and Tr. 564-567 (background) 571-579), made it its key account or manufacturer's representative in San Francisco County, and gave it special advertising allowances no other retailer obtained. (Pl. Ex. Nos. 685, 689, 4236, 4237.)

The arguments advanced for the refusals to deal by the appellees are unconvincing. Even if not, they do not approach the realm of certainty which precludes determination by the jury of the validity of the reasons asserted. *Standard Oil Co. of California v. Moore,* 251 F. 2d 188 (9th Cir. 1957); *Girardi v. Gates Rubber Co. Sales Division, Inc.,* 325 F. 2d 196 (9th Cir. 1963). The extensive boycott of appellants could not operate successfully without the support of the manufacturers who conduct business themselves for

their own account in every major market in the country.

The reasons advanced by California Electric, i.e., that Manfree chose not to buy Philco appliances from California Electric, was completely discredited as shown above. The testimony of Muntain regarding the supposed disinclination of Manfree to buy is refuted by his statements to Mr. Freeman and by the statement to Mr. Bernard Freeman of his own superior, Mr. Valenson (California Electric Sales Manager), that there indeed was a conspiracy to deprive Manfree of product. It is further impeached by the circumstances that in June, 1960, Manfree desired to but was unable to buy Philco appliances (Pl. Ex. No. 1783), and is further refuted by the fact that such refusal to deal continued during the entire period of time that California Electric handled the Philco line, until 1963 (Ap. O.B., pp. 55-56). Indeed, the arguments of California Electric are easily answered by reference to the fact that if the local market were highly competitive, there should have been a constant succession of California Electric salesmen to Manfree soliciting business. Of course, this did not occur (Ap. O.B., p. 56).

Frigidaire's arguments are refuted when it is shown that Frigidaire at no time before trial disclosed to appellants the reason now advanced to this Court for its refusal to deal: Manfree's allegedly cramped and unattractive premises (Frig. Br., p. 29). Instead, Mr. Hamilton, appellee's Appliance Sales Manager, pointedly told Mr. Freeman of Manfree that a Frigidaire

representative would be wasting his time to visit Manfree, as Frigidaire did not sell to discount stores Tr. 5825-5829).[6] Frigidaire saw to it that the notations concerning this telephone call to Mr. Freeman shown on Pl. Ex. No. 491 were erased. Thus, Frigidaire's evidentiary arguments ignore basic testimony directed against it and that its defense was impeached.

Likewise, although now claiming that so-called dealer structure was the reason that it refused to sell to Manfree, G.E., shown to have an enforced retail price policy operating in San Francisco, believed that it could not sell to Hale and Manfree at the same time. Pl. Ex. No. 514, involving the question of G.E. selling to Manfree, contains notations "Hale" and "discount houses doing a tremendous volume of major appliance business," wherein it is apparent that when Mr. Walker, G.E. regional vice president (Tr. 4130), discussed with Mr. Gough of G.E. the question of selling to Manfree (a discount store), Hale was discussed, as was GET (Tr. 4169, 4176-4177). The evidence also showed that Mr. Gough did not disclose to Mr. Walker the fact that Manfree had requested a five carload purchase from General Electric (Tr. 4180-4181). Further, the evidence disclosed that

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[6]Frigidaire claims that Mr. Freeman "clearly understood Hamilton to be referring to "closed-door" discount stores (Frig. Br. p. 37, n. 55). This misstates the witness' testimony on cross-examination by this appellee (Tr. 6037). Mr. Freeman said that Hamilton could have said "closed-door operations" or "discount stores", as at that time (1960) these terms "meant the same thing" *(Ibid.)*. The basic Frigidaire policy—refusal to sell to a particular class of dealer—is clear.

U.S.E.'s radio and small appliance concession (Camrose) purchased large quantities of G.E. radios and small appliances from G.E. (Pl. Ex. No. 517; Tr. 4177-4179), and yet its major appliance concessionaire was unable to buy major appliances from the same supplier. The same situation applied to Lancaster, Graybar, and Westinghouse (Spec. of Error, V, I, 8, pp. xlvii-xlviii). A jury could readily conclude that there was something else than "cramped" store space that induced such vendors to deny the subject products to Manfree at the same time.

The type of dealer structure that G.E. had in mind further is exposed in Pl. Ex. For Id. Nos. 5032, 5033, 5034-5044 (described in Spec. of Errors, V, C, 1, at pp. xv-xvi) which shows what G.E. wanted for the local retail market was a dealer organization that did not engage in retail price competition and maintained high retail margins along with the other appellees. This would require Manfree's exclusion.

Maytag claims that Manfree was an undesirable account to which it was unwilling to sell. This is directly refuted by the statement of Mr. Mitchel of Maytag West Coast to Mr. Freeman that Maytag would no longer sell to Manfree because it was no longer going to sell to discount stores in San Francisco due to a change in its policies (Offers of Proof at Tr. 6059-6064). The trial testimony of Mr. Mitchel as to his "decision" not to sell to Manfree was impeached with his deposition testimony. At that earlier time, Mitchel, for some reason, could not give the "important" reasons for the cancellation, which sud-

denly occurred to him at trial (Tr. 3419, 3030).[7] Maytag claims that Mitchel noted in his deposition that a Manfree salesman "smelled like a distillery" (M.T. Br., p. 16, n. 9). But Mitchel did *not* go on to say this was the grounds for termination.

That the reasons for refusing to deal with Manfree advanced by the appellees are trial defenses and not dispositive of liability is further shown by the fact that these companies or their distributors *all* adopted policies of inducing the advertising of their appliances or television sets at manufacturer's list price (Ap. O.B., pp. 32-36). It is certainly logical to conclude that discount stores, as advertised "price-cutters", would threaten these policies. Why else would Graybar, local representative for Hotpoint, call a meeting of key retail dealers and openly announce that it was no longer going to sell to discount stores in San Francisco County? (Tr. 6120-6125). The testimony of Mr. Vern Brown, former District Manager of Graybar, was that a breakfast meeting was held at the Palace Hotel with representatives of the key retailers in San Francisco, where Mr. Mayben (Graybar Manager) announced that Graybar's distribution policy had changed, in that "that we were no longer serving or franchising discount-type houses" (Tr. 6125).

7. Manufacturers' list prices as retail prices

Each appellee manufacturer admittedly published retail list prices as of the time of the filing of the

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[7]Apart from Mr. B. Freeman's testimony, the evidence showed that Maytag changed its policies in San Francisco in April 1959 by favoring Hales and refusing to sell to Manfree and GET.

first complaint (G.E. Br., pp. 10-11; Frig. Br., pp. 9-10; R.C.A. Br., p. 5; W.P. Br., p. 6; B.W. Br., p. 15). They also allocated millions of dollars for newspaper advertising for their products, as they tacitly admit. However, appellees argue that no inferences can be drawn from the fact that advertising allowances were tied directly to advertising at the manufacturer's list price. They say the distributors adopted their own suggested prices. But whether or not the distributors followed the factory prices was a jury question, based on the evidence.

Whirlpool argues that Meyer did not follow its list prices in Meyer's suggested retail prices (W.P. Br., pp. 6-7). Yet the evidence disclosed that Meyer adopted the *exact* Whirlpool prices 60% of the time (Pl. Ex. No. 5115).

R.C.A. also argues that Meyer didn't adopt its suggested retail prices (R.C.A. Br., p. 5). Yet, Pl. Ex. No. 1947 (R.C.A. price sheets) and Pl. Ex. No. 1948 (Meyer price sheets) show that Meyer's suggested retail prices were either identical to, or clearly based upon R.C.A. list prices. From Pl. Ex. No. 5116 (comparing these prices), the jury could reasonably conclude that Meyer followed R.C.A.'s list prices (Meyer's prices were the same as, or were an even $10 or $20 higher, 71.14% of the time).[8]

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[8]R.C.A., among others, apparently feels it is the law that nothing short of 100% conformity permits the finding of a price-fixing conspiracy (R.C.A. Br. p. 5; W.P. Br. pp. 22-23). Such is not the law:

". . . Hence, prices are fixed within the meaning of the Trenton Potteries Co. Case if the *range* within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they

Although the evidence showed *(supra)* that the manufacturer appellees and their distributors worked closely in all areas of distribution, it is argued by the manufacturers that, as a matter of law, a jury could not conclude that the factories knew of the distributors' cooperative advertising programs, or other activities in the local market, including retail price levels. The refrain in the briefs is overwhelming that the factory appellees did not even know the local retail market. However, the Supreme Court in *Albrecht v. The Herald Co.,* 19 L. Ed. 2d 998 (1968), recently authoritatively disposed of the fiction that the modern manufacturer is not directly involved in local retail markets:

> "Our Brother HARLAN seems to state that suppliers have no interest in programs of minimum resale price maintenance, and hence that such programs are 'essentially' horizontal agreements between dealers even when they appear to be imposed unilaterally and individually by a supplier on each of his dealers. Although the empirical basis for determining whether or not manufacturers benefit from minimum resale price programs appears to be inconclusive, *it seems beyond dispute that a substantial number of manufacturers formulate and enforce complicated plans to maintain resale prices because they deem them advantageous.* (Citations omitted). As a

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are to be uniform, or if by *various formulae* they are related to the market prices. *They are fixed because they are agreed upon."* [Emphasis added.] *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 222-223 (1940).

From the degree of similarity noted, the jury could reasonably conclude that vertical price-fixing combinations existed. *Esco Corporation v. United States,* 340 F.2d 1000, 1006-1007 (9th Cir. 1965).

theoretical matter, it is not difficult to conceive of situations in which *manufacturers would rightly regard minimum resale price maintenance to be in their interest. Maintaining minimum resale prices would benefit manufacturers when the total demand for their product would not be increased as much by the lower prices brought about by dealer competition as by some other nonprice, demand-creating activity.* In particular, when total consumer demand (at least within that price range marked at the bottom by the minimum cost of manufacture and distribution and at the top by the highest price at which a price-maintenance scheme can operate effectively) is affected less by price than by the number of retail outlets for the product, the availability of dealer services, *or the impact of advertising and promotion, it will be in the interest of manufacturers to squelch price competition through a scheme of resale price maintenance in order to concentrate on nonprice competition.* Finally, if the retail price of each of a group of competing products is stabilized through manufacturer-imposed price maintenance schemes, the danger to all the manufacturers of severe interbrand price competition is apt to be alleviated." [Emphasis added.] (19 L.Ed. 2d 998 at 1003 n. 7.)

But whether, based upon the facts that (a) factory representatives called on the local distributors many times during the month; (b) the distributors handled, as intermediaries, factory advertising and promotional programs; (c) there were factory-sponsored trade shows in which distributors (and retailers) were in attendance; and (d) the manufacturers

advertised their products in local papers at factory prices, it is true or not that the factory appellees did not know of the distributors' coercive price policies with retailers, and approved or ratified them, is purely a jury question. There was sufficient evidence for the jury to conclude that it is a fiction for the appellees to argue that they did not know of and support a distributors' advertising policy.

R.C.A.'s defense of ignorance is torn asunder by Pl. Exs. for Id. Nos. 343 and 344. A jury could reasonably conclude that if Meyer had absolute freedom to vary its suggested retail prices from that of the manufacturer, it would not request the manufacturer to change its list prices. If such absolute discretion existed, senior officials of R.C.A. would not logically discuss such a request from the distributor. But Exhibit Nos. 343 and 344 are proof of serious discussion of such requests. No. 343 shows that A. H. Meyer, Meyer's President, telephoned Mr. Siedel of R.C.A. concerning this list price question. (Mr. Siedel was an executive officer of R.C.A. with offices in New York City (Tr. 216-221).)

Exhibit for Id. No. 343 further identifies models as to which Meyer requested R.C.A. for an increase in manufacturer's list price. Comparison of Pl. Ex. No. 1947 G, H (R.C.A.'s price list) with Pl. Ex. No. 948 (Meyer's price list) shows that Meyer was using the precise R.C.A. list price on these models to its retailers in San Francisco. This is convincing additional proof that Meyer was not free to set suggested list prices as desired, but pursuant to common under-

standing with R.C.A. was compelled to discuss list price changes with it. San Francisco was a high margin area for retailers, and the appellees involved herein saw to it that it remained such (Pl. Ex. No. 4227).

Maytag denies that it had a suggested list price advertising policy. In so doing, it ignores Pl. Ex. No. 337 (Ap. O.B., p. 33). Instead, Maytag urges that as a matter of law the Court is bound to accept its documentary evidence as conclusively showing that there was price competition in San Francisco (M.T. Br., pp. 12-13).[9] An analysis of this evidence permits the conclusion that the distributor was directing retail prices, as the prices shown in these advertisements did not vary more than a few dollars, one from one another.[10] And, Pl. Ex. for Id. No. 565 (Maytag informed Manfree that it was not to advertise Maytag products with prices shown) is indicative of Maytag's policy of maintaining suggested prices in advertisements on Maytag products. Why else would this stricture be imposed?

G.E. also disclaims a suggested list price policy in the advertising of its product (G.E. Br., pp. 10-13). It (as Maytag) ignores appellants' direct evidence to

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[9]The testimony of Sanford of Hale, cited by Maytag (Tr. 719-722) contains the admission that this co-conspirator retailer followed Maytag's list prices (but not in every instance). In addition, the comparative prices shown in Pl. Ex. No. 4346-B goes only to Hale's secret pricing by which the merchandise is given a tag price at suggested list but the salesman is allowed a lower sell price (Tr. 603, 722-725).

[10]See Appendix A, attached hereto.

the contrary: Pl. Ex. Nos. 708, 714, and 717; see also Pl. Ex. Nos. 4127, 4128, 4129, and 4130.

Appellees Frigidaire, G.E., and Hotpoint, and co-conspirators Meyer, Westinghouse, and Graybar, agreed to maintain the advertised prices of major appliances at suggested prices, as shown by Pl. Ex. No. 2090. This is also evidence of agreement by retailers to maintain *their* prices at manufacturers' suggested retail prices. This exhibit refers to a group directed sales campaign of the Northern California Electrical Bureau. It shows the purposes, intent and meeting of minds of these appellees to base tag price at manufacturer's list price. (Pl. Ex. No. 2090 is dated January 1959, and is a graphic illustration of distributor and retailer common thinking on use of list prices during this period of time.) Not only were these vendor appellees members of the N.C.E.B., but at the same period also members were Hale (Tr. 904-907, 948-950, 990-992), Sterling (Tr. 1929-1931), Lachman Bros. (Tr. 1927-1934), Macy's (Tr. 1929-1931), and Redlick's (1929-1931).

8. Knowledge of vendor defendants that local defendant retailers controlled the advertising of the subject products in the local market

Each of the vendor appellees and co-conspirators had common knowledge that the large furniture, department or appliance stores in San Francisco controlled the advertising of these major consumer products in the local newspapers, and that such retailers' advertised prices were based on the vendors' list prices (Ap. O.B., pp. 119-121).

This situation is ignored by the appellees in their briefs, except for their contentions that prices were not advertised at vendors' list prices which is contradicted by direct evidence to the contrary.

9. Morning newspaper boycott

U.S.E.'s repeated requests to the two morning San Francisco newspapers to be allowed to advertise were denied, at a time when the co-conspirator retailers were the dominent advertisers in such newspapers *(infra)*. Appellees argue that this Court as a matter of law must draw the inference that each newspaper independently, and without pressure from the conspirators, had a policy of not allowing "closed door" stores or discount stores to advertise.

But the inference from the facts of refusal to permit advertising is to be drawn by the jury. Clearly, Borg-Warner Ex. No. 9024 was direct evidence that it was pressure from Hale which prevented the newspapers from taking discount store advertising. Even assuming the correctness of the Court's ruling in striking Ex. No. 9024, that the refusals to deal by the morning newspapers was pursuant to the conspiracy charged was shown by the circumstances involved. In addition to the rank newspaper discrimination involved, the evidence showed extensive advertising in those newspapers by Hale and the other co-conspirator retailers (Pl. Ex. No. 4370; Tr. 323, 329-332, 1842-1845, 2305-2309); that Lachman admittedly refused to advertise in the afternoon newspaper because U.S.E. advertisements were carried (Tr. 2035-2046);

that Hale's advertising was substantially reduced in the afternoon newspaper in 1959 while it carried U.S.E. advertising (Tr. 332-333); and that the morning newspapers gave special combined rate advantages to Hale's and Dohrman Commercial Co. (Tr. 299-317). (See Ap. O.B., pp. 52-53). The record showed that co-conspirator the *San Francisco Chronicle* believed it to be to its best interests to first call Macy's and determine its reaction toward allowing discount stores to advertise (Tr. 6879-6880). Clearly, under this Court's decisions in *Girardi v. Gates Rubber Company Sales Division,* 325 F.2d 196 (9th Cir. 1963), and *Standard Oil Co. of California v. Moore,* 251 F.2d 188 (9th Cir. 1957), it was for the jury alone to determine the significance of this telephone call, especially in view of the fact that following the call U.S.E. was not allowed to advertise in the *Chronicle.* Contrary to the argument of some appellees (e.g., Cal. El. Br., p. 42; Frig. Br., p. 35) that the local newspapers only had an indiscriminate policy against accepting advertising from stores that required membership cards for admission, it was shown that "Tops", another discount store, was allowed to advertise in the *Chronicle,* even though it did request customers to sign cards (Tr. 6888). What manifestly occurred is that the conspiracy in San Francisco decreed that discount stores were not to go into major appliance and television set retail business, in competition to the conspiracy, and this included the denial of newspaper advertising. The newspapers, in short, gave in to the same pressure exerted as sup-

pliers of the television sets and major household appliances.

10. Boycott of GET, another discount store in San Francisco County

Appellants were not the only discount operation in San Francisco County unable to obtain the leading brands of such merchandise. The other discount store then in existence in San Francisco, GET (Lakeshore Furniture), was also unable to obtain such products.

Frigidaire (Frig. Br., pp. 6, 32) and Borg-Warner (B.W. Br., p. 14) seek to have this Court believe that GET was supplied with the Norge and Hotpoint appliances, and Westinghouse appliances or television sets, and that as a matter of law this Court must find that GET never expressed interest in carrying the Frigidaire line. Appellees, however, do not make it clear that Graybar refused to sell Hotpoint products to, or disenfranchised GET, at the same time it disenfranchised Manfree, in the fall of 1958 (Tr. 3068-3069). Graybar did not franchise GET until it was acquired by GEM in 1962 (Tr. 3190). It is significant to note that Graybar felt it lacked sufficient authority to sell Hotpoint appliances to GEM (GET) until it discussed the matter with Hotpoint (Pl. Ex. No. 482). Appellees do not inform the Court that Westinghouse did not sell to GET until April, 1961 (Tr. 6169). Nor do they observe that GET could obtain only trifling supplies of Norge appliances after 1959 (Pl. Ex. No. 5121). The testimony referred to by Frigidaire (Frig. Br., p. 6, f.n. 8) that GET's appliance concessionaire never requested Frigidaire's products, must be re-

ceived as an advocate's argument about the facts. It is very difficult to believe, and the jury was certainly not required to, that the related conference between representatives of Frigidaire and GET's appliance concessionaire did not involve a request to acquire products. Thus, the record shows that GET was excluded from the same products denied Manfree, for virtually the same period of time.

11. Sales by defendant vendors to discount stores located outside of San Francisco

However, while appellants and GET *in San Francisco County* were subjected to the boycott, some of the vendor conspirators were readily selling major appliances and television sets to other discount stores, situated in San Jose and Oakland (after Hale closed its San Francisco appliance store operations in 1963). (Spec. of Errors, V, I, 6, pp. xliii-xlv.) Appellees do not argue with this fact. From this evidence, the jury could conclude that these suppliers found nothing wrong with discount stores *per se* as dealers, but only retailers of that type situated in San Francisco who were a threat to the conspiracy market in San Francisco.

12. Special terms in the purchasing and advertising of the subject products, favoring the co-conspirator retailers

Existence of special discriminating terms in the purchase and advertising of major appliances and television sets was established, by direct evidence, between the conspirator vendors and Hale, and four other local co-conspirator retailers (Ap. O.B., pp. 37-

41). These retailers received the bulk of "special" advertising dollars in the local market from such vendors, and therefore were the key advertisers of such products in the San Francisco newspapers.

Frigidaire avoids discussion of its "key account" program (Frig. Br., p. 44). California Electric attempts to avoid the issue by arguing that Philco itself handled arrangements with Hale directly (Cal. El. Br., p. 6). But see Ap. O.B., pp. 40-41; Pl. Ex. Nos. 1847-1898. California Electric Supply supervised Philco Associate Distributor advertising funds.

Other appellees attack this statement, but ignore the evidence therein referred to which shows that Hale was a selling arm or agent of the vendors involved. The evidence of this favored treatment is direct evidence, and should not have been ignored by the trial Court:

As to G.E., see Pl. Ex. Nos. 708, 712, 713, 714, 715, 717. Pl. Ex. for Id. No. 1184, shows on its face a special advertising fund established between G.E. and Hale.

As to Maytag, see Pl. Ex. Nos. 1034, 1035, 1081, 1059, 1061, 1062.

As to Borg-Warner, see Pl. Ex. Nos. 4101, 4102, 4099, 4055, 4089.

As to Hotpoint, see Pl. Ex. Nos. 28, 1094-1107, 4387, 4388, 4390. See also Tr. 3229, 3233.

As to R.C.A., see Pl. Ex. Nos. 574, 575.

As to Whirlpool, see Pl. Ex. Nos. 685, 686, 687, 688, 680, 681, 4236.

Appellees seem to argue that the burden of proving that the special programs in existence between them and Hale, Macy's, Lachman Bros., Redlick's and Sterling were *not* discriminatory was with the appellants. However, this ignores the evidence which properly speaks for itself. By that evidence, appellants established the existence of special programs and special funds earmarked for one or a few of these retailers. The documents on their face show a discriminatory plan or program. They were conspiratorial, involving each party in an unlawful undertaking. Appellants, if granted a new trial, would be entitled to an instruction that a *prima facie* case of discrimination is found when a special sale or a special program is given to one or a few retail accounts and that no justification exists for such special programs. See *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 694 (1967); *F.T.C. v. Fred Meyer, Inc.*, 88 S. Ct. 904 (1968).

13. Direct co-conspirator retailer action to foreclose appellants' newspaper advertising

Just prior to the filing of appellants' first complaint in August, 1960, a representative of co-conspirator Sterling (Schreck) arranged a meeting with an officer of the San Francisco *News Call Bulletin* to protest U.S.E. advertising (Ap. O.B., p. 70). Lachman Bros. refused to advertise in the *News Call Bulletin* because it allowed U.S.E. to advertise (Tr. 2305-2309). Hale had limited its advertising in this paper in 1959 (Pl. Ex. No. 4343; Tr. 331-333).

This evidence is ignored by appellees.

Conclusion:

Under settled principles applicable to motions for a direct verdict, the above statements are assumed true, and the arguments and contrary factual propositions advanced by the appellees create issues of fact to be determined by the jury under the Seventh Amendment. The trial Court clearly erred in granting a directed verdict on this record.

II. THE SPECIAL DEFENSES OF THE APPELLEES ARE UNMERITORIOUS

A. A Notice of Appeal is to be liberally construed to effectuate the intent of the parties, when no prejudice is shown

1. The Court has jurisdiction over Norge Sales Corporation

Norge Sales argues that this Court has no jurisdiction over it, because the Notice of Appeal did not specifically designate an appeal from the judgment in summary judgment in favor of Norge Sales (R. 165-166). (B.W. Br., pp. 3-5). But it was clearly the intent of appellants to appeal from the Order dismissing Norge Sales, as shown by Item IV of Appellants' Statement of Points On Appeal and Designation of the Record (R. 2291). See *Foman v. Davis,* 371 U.S. 178, 225 (1962), *Gajewski v. Stevens,* 346 F.2d 1000, 1001-1002 (8th Cir. 1965); *Holz v. Smullan,* 277 F.2d 58, 60-61 (7th Cir. 1960); *Poe v. Gladden,* 287 F.2d 249, 250 (9th Cir. 1961); *Blitzstein v. Ford Motor Co.,* 288 F.2d 738, 740 (5th Cir. 1961). Notices of appeal are to be liberally interpreted to give effect to the intent of the parties unless prejudice is shown. See *Ginsburg v. Ginsburg,* 276 F.2d 94,

95-96 (9th Cir. 1960); citing 28 U.S.C. § 2111. Costs were assessed against appellants in favor of appellee Norge Sales by the trial Court in the Judgment on Directed Verdict and Order Dismissing Complaints (R. 1979), not earlier. There is no prejudice to Norge Sales; its attorneys represented Borg-Warner, and Norge Sales did not deem the order in summary judgment sufficiently final to present a cost bill, but waited until the judgment on directed verdicts was entered.

B. Maytag West Coast is in error in urging that appellants may not show its knowledge of the conspiracy and reasons for joining it even though they occurred prior to the time of the refusal to deal

The Supreme Court in *Continental Ore Corporation v. Union Carbide and Carbon Corp.,* 370 U.S. 690, 709-710 (1962) made it clear that the relevancy of evidence offered to prove knowledge and participation in a conspiracy to violate the anti-trust laws does not depend on the date that the complaining party is injured by the particular conspirator. This Circuit has also so ruled. *Esco Corporation v. United States,* 340 F.2d 1000, 1005-1006 (9th Cir. 1965). The injured claimant must be allowed to show the conspirator's knowledge of the conspiracy at the time of joinder and his participation. *Dextone Co. v. Building Trades Council,* 60 F.2d 47, 48-49 (2nd Cir. 1932). If the law were otherwise, a claimant could never show that a defendant joined the conspiracy when the reasons given for its joinder, as here, occurred prior to the date of the refusal to deal. See *Standard Oil Co. of California v. Moore, supra,* at p. 209, n. 21; *Flintkote Company v. Lysfjord,* 246 F.2d 368, 377-379 (9th Cir.

1957). Clearly the trial Court's rulings excluding Maytag's statements to Mr. B. Freeman just prior to its termination of Manfree's franchise were in error.

III. THE TRIAL COURT ERRED IN THE EXCLUSION OF EVIDENCE[11]

A. Mr. Valenson's admissions to Mr. Freeman were admissions against interest, and admissible against California Electric

California Electric argues that Mr. Freeman's testimony concerning the telephone call with Mr. Valenson is not admissible, because Mr. Valenson's authority to speak for appellee was not established (Cal. El. Br. pp. 19-22). But, appellants abundantly demonstrated the fact of authority and agency. Mr. Valenson's authority and position as a directing official was established by Mr. Rising (Tr. 3692; 3739-3740, 3751, 3753-3755). He was appellees' sales manager. Pl. Ex. Nos. 665, 1847-1898 proved that he arranged special advertising promotions with Hale. Thus, citation to *Flintkote Company v. Lysfjord,* 246 F.2d 368 (9th Cir. 1957), does not aid appellees. This Court ruled in *Flintkote* that the testimony of what Mr. Baymiller told plaintiffs was admissible, since he was an executive officer of his company. Declarant Ragland's title was assistant sales manager of defendant Flintkote Co. Here Mr. Valenson was California Electric's sales

[11]Appellants will refer herein to only certain of the errors in the exclusion of evidence and do not discuss all errors alleged in the Specifications of Errors and in their Opening Brief.

manager, one step up the ladder, and on par with Mr. Thompson in the *Flintkote* case. The Valenson statements should have been admitted as admissions against California Electric, independently of whether or not it was admissible as the statement of a conspirator against other conspirators. *Flintkote, supra,* at p. 386; *United States v. E. I. DuPont de Nemours & Co.,* 107 F.Supp. 324, 325 (D. Del. 1952). California Electric has admitted its participation in a conspiracy to injure appellants and to suppress evidence. Yet under the Court's ruling appellants are now liable to California Electric Supply Co. for costs of suit.

B. Borg-Warner Exhibit 9024 was placed in evidence by that defendant and it should not have been stricken

It is clear that Borg-Warner counsel is now seeking to raise inadvertance on trial counsel's part in connection with Borg-Warner's offer of the evidence. (B.W. Br., pp. 57-58). Yet appellees insist on calling for the strict application of pretrial statements and stipulations given by counsel for appellants. Here counsel for Borg-Warner asked for admittance into evidence the above exhibit, which was allowed. Having been admitted, it became part of the evidence of this case and should not have been stricken. The motion to strike the *exhibit* was made by (at least on behalf of) counsel for Borg-Warner. Tr. 6628-6629. Appellees' citation of authority (B.W. Br., p. 59) does not deal with the situation at hand: A party moving admission of evidence cannot at a later time in the trial change its mind and have that evidence stricken (See Ap. O.B., pp. 140-141).

C. The Court prejudicially excluded documents pertaining to N.E.M.A. and A.H.L.M.A. exhibits (See B.W. Br., pp. 57-68)

These exhibits are categorized as:

(1) Pl. Exs. for Id. Nos. 431 and 3022;

(2) A.H.L.M.A. documents from the files of Norge Sales: Pl. Exs. for Id. Nos. 3006, 3007, 3024, 3026, 3029, 3030, 3034, 3036, 3037;

(3) Documents from the files of N.E.M.A.

Borg-Warner and other appellees argue that no foundation was established for the introduction of these exhibits.

(1) Pl. Ex. for Id. No. 431 was stipulated by counsel for Borg-Warner (from whose files the document came) to have been duly executed (Tr. 6619). With respect to Pl. Ex. for Id. No. 3022, it was stipulated that the communication was received at the office of Mr. Bull, Vice President of Norge Sales (Tr. 6621). See *Esco Corporation v. United States,* 340 F.2d 1000, 1009-1013 (9th Cir. 1965) [as to Exhibit No. 110 in that case.]

(2) With respect to the A.H.L.M.A. documents, they were admitted to have come from the files of Norge Sales Corporation and are authentic (Tr. 3315). *Esco Corporation, loc. cit. supra.*

(3) The N.E.M.A. exhibits were shown to have been produced by the Secretary of the Consumer Products Division of that Association, Mr. R. D. Smith (Tr. 6453). His deposition was marked for identification by the Court (Tr. 6462, 6466-6467).

Appellants established a *prima facie* showing of authenticity of these exhibits under the rule set forth in *Esco Corporation v. United States,* 340 F.2d 1000 (9th Cir. 1965), at page 1013, as follows:

> "The question of its authenticity was one for the jury, subject always to the sound judicial discretion of the trial judge. The rule is aptly expressed by Judge Merrill of this court in his Carbo decision, supra."

It does not behoove appellees to argue the authenticity of documents which are known to be genuine and authentic. The relevancy of these documents has been discussed (Ap. O.B., pp. 164-165). Indeed, Whirlpool concedes the relevancy of such documents under *American Tobacco Co. v. United States,* 147 F.2d 93 (6th Cir. 1944). (W.P. Br., p. 34).

In discussing the foundation for the introduction of these exhibits, this Court's decision in *Standard Oil Co. of California v. Moore, supra* is mentioned by appellees as though the trial Court did not include relevancy in its ruling as to "foundation". Appellants submit that the trial Court's foundation rulings did include relevancy findings; since a *prima facie* case of authenticity had been established. As such, *Moore* is unquestioned authority for the admissibility of evidence showing that the manufacturer appellees (who deal closely with the retailer co-conspirators as their local advertising agents), also worked closely together and controlled the major appliances industry as a supra-governmental agency. This is a relevant circumstance in proof of conspiracy.

D. Pl. Ex. for Id. No. 4028 established the contrary to Borg-Warner's contention that the boycott of U.S.E. was not discussed at the Villa Hotel meeting

Borg-Warner and Norge Sales claim (B.W. Br., p. 45) that Graybar requested the meeting at the Villa Hotel. This document expressly shows that it was important *for Norge Sales* that Bull, Bonnet and Lancaster discuss the transhipping of Norge appliances at this conference, and that it was Norge Sales that wanted the meeting.

E. G.E.'s own documents show that retailers in San Francisco did not engage in retail price competition

G.E. disclaims attempts to control retail prices in the local market, or that it engaged in a coercive price control program (G.E. Br., pp. 10-13). Yet, Pl. Ex. for Id. No. 5033 admits that retail price uniformity exists under G.E.'s support and approval. Pl. Ex. for Id. Nos. 5032, 5034 and 5044 all directly show that G.E.'s decision whether to franchise discount stores had to be based on considerations of whether to continue a controlled market. They show the G.E. policy of not selling to discount stores. In support of the trial Court's ruling, G.E. asserts their confidentiality as intra-office reports, cumulativeness, and lack of foundation (G.E. Br., pp. 41-42). But the documents were not inadmissible because of their "confidentiality", and they were not cumulative, being direct evidence of admissions of lack of price competition among G.E. dealers. They are admittedly from the files of G.E., thus issue of "authenticity" should have been submitted to the jury. *Esco Corporation v. United States,* 340 F.2d 1000, 1012 (9th Cir. 1965).

Pl. Ex. for Id. Nos. 5045-5047 established what is denied by appellees: the brands carried by discount stores were a matter of concern to the appellees, and studies were made as to what competitors were selling them.

F. The exclusions of the testimony of Vern Brown and Pl. Exs. for Id. Nos. 5112 and 5113 were an abuse of pre-trial rules

The fundamental purpose of litigation is to ascertain the truth. Pre-trial procedures should not be used to prevent the admission into evidence of highly probative evidence. The testimony of Mr. Brown and these exhibits discredit the defense of Hotpoint, and prove the existence of a conspiracy to refuse to deal with discount stores in San Francisco County. Clearly the Pre-Trial Conference Order should have been amended, to permit substantial justice. *Simpson Timber Co. v. Palmberg Const. Co.,* 377 F.2d 380 (9th Cir. 1967); *Washington State Bowling Prop. Ass'n v. Pacific Lanes,* 356 F.2d 371 (9th Cir. 1966); *Globe Indemnity Co. v. Capital Ins. & Sur. Co.,* 352 F.2d 236 (9th Cir. 1965). In the last case, this Court stated, at p. 239:

> "Pre-trial orders can be and generally are valuable aids to a just determination of litigation. But occasionally strict adherence to them will produce an opposite result. (See Rule 16). Granted, a pre-trial order should not lightly be modified, nevertheless a court should be liberal in allowing amendments where no substantial injury will be done the opposing party, *the failure to allow the amendment might result in a grave injustice to the moving party,* and the inconven-

ience to the court is relatively slight." (Emphasis added.)

Here Mr. Brown was not even an "undisclosed" witness, since he was listed in "Plaintiffs Separate Listing of Documents Pursuant to Local Court Rule Para 4(10) Showing Nature and Relevance of Documents and Witnesses". (R. 1533).

G. The trial court erred in excluding evidence offered against R.C.A.

(1) Ex. for Id. No. 1691 (R.C.A. Br., p. 24, n. 11):

Mr. Bernard Freeman testified in substance that he saw this particular letter after it was prepared (written) and signed, and that he put it into an envelope and gave it to "one of the girls to mail" (Tr. 5984). (Tr. 5980-5984). As evidence of the sender's practice of mailing correspondence, together with the well-established presumption that a letter correctly addressed and mailed is presumed to have been received (Calif. Ev. Code §641 [former Calif. Code of Civ. Proc. §1963(24)]; 1 *Wigmore on Evidence* §95 (1st Ed.)), this was sufficient foundation. *Hughes v. Pacific Wharf etc. Co.,* 188 Cal. 210, 219-224 (1922). *Wagner Tractor, Inc. v. Shields,* 381 F.2d 441 (9th Cir. 1967), cited by R.C.A. (R.C.A. Br., p. 24, n. 11) is not inapposite: There the sender was not determined, and there was apparently no recipient's address on the telegram (381 F.2d at p. 446).

R.C.A. denied receipt (which is simple to do). The jury should decide whether they believed the letter was probably received, as there was sufficient foun-

dation for its admission. The relevancy of Manfree's letter requested product consistently denied to it from a major television manufacturer, is obvious. *Standard Oil Co. of California v. Moore,* 251 F.2d 188, 201 (9th Cir. 1957).

(2) Exs. for Id. Nos. 343, 344 (R.C.A. Br., pp. 26-27):

Foundation for these exhibits, each originated by R.C.A. (R.C.A. Br., p. 27), comes from the pre-trial position of appellee's counsel (R. 1533) that no objections of lack of foundation would be made as to "correspondence emanating from R.C.A." R.C.A. now apparently contends this excludes *intra-company* memoranda as not *emanating* from R.C.A.! (R.C.A. Br., p. 27). There is no dispute that these exhibits came from R.C.A.'s files; thus they clearly were authenticated (Calif. Ev. Code §1414).

Analysis of Pl. Ex. for Id. Nos. 343 and 344 shows the extreme prejudice to appellants in the rejection of such evidence: these documents are clear proof that R.C.A. was the active instigator, and the principal involved in maintaining R.C.A.'s list prices as the advertised and tagged retail prices in the San Francisco market. Exhibit No. 343 is direct evidence of a conversation between R.C.A.'s vice-president in charge of its Western Division, Mr. H. R. Maag (Tr. 4668-4669), and its Director of Regional Operations in 1957, R. W. Saxon (Tr. 4530-4532), concerning the suggestion of Meyer (then Leo J. Meyberg Co.), to raise list prices on certain television sets, while maintaining the existing dealer net price.

Exhibit No. 343 identifies models as to which Meyer requested R.C.A. for an increase in manufacturer's list price. Comparison of Pl. Ex. No. 1947 G. H. (R.C.A.'s price list), with Pl. Ex. No. 1948 (Meyer's price list), shows that Meyer was submitted the precise R.C.A. list price on these models to its retailers in San Francisco. This is convincing additional proof that Meyer was *not* free to set "suggested" list prices as it desired, but pursuant to a common understanding with R.C.A. was compelled to discuss list price change requests with R.C.A. Also, the fact that Pl. Ex. for Id. No. 343 includes an attachment of appellee General Electric Company's dealers' list prices is further proof that R.C.A. received direct knowledge of the retail price advertising policies of A. H. Meyer Co.

Pl. Ex. for Id. No. 344 is a memorandum of September, 1958, from Mr. Wallace of R.C.A.'s regional office to Mr. Peterson of R.C.A.'s office in Camden, New Jersey, forwarding a Meyer price sheet containing "suggested" retail prices. Why should R.C.A. officials exchange such information if it was of absolutely no concern to R.C.A. what suggested list prices were promulgated by its distributor to retailers?

(3) Ex. for Id. No. 348 (R.C.A. Br., pp. 27-28):

That R.C.A. is properly chargeable for knowing participation in an advertising program coercively operated in the local market to maintain retail prices is further demonstrated by Pl. Ex. for Id. No. 348, also prejudicially excluded from evidence. This exhibit is a letter from P. L. Henry, vice-president of

Meyer, to Mr. Wallace of R.C.A. (with carbon copies noted to Mr. Don Gentile, R.C.A. sales representative for the San Francisco area, and Mr. J. T. Bannon, of R.C.A.'s Camden office), stating in part: "In some instances we do allow cut pricing and others we don't". This is evidence of appellee's knowledge that its distributor is controlling retail prices, after title to the goods has passed to the R.C.A. dealer; and from such evidence (in conjunction with all other evidence [*Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 699 (1962)] the jury could further conclude that R.C.A. participated with Meyer in the price maintenance program, in violation of the Sherman Act. *United States v. Paramount Pictures, Inc.,* 334 U.S. 131, 155, 161 (1948); *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365 (1967); *Albrecht v. The Herald Co.,* 19 L.Ed. 2d 998, 1002 (1968).

Those in charge of the distribution of great sums of advertising money are chargeable with the manner in which such funds are utilized; as has been expressly recognized in enforcement of the Robinson-Patman Act. See *Federal Trade Commission v. Fred Meyer, Inc.,* 88 S. Ct. 904 (1968).

R.C.A.'s counsel stipulated this letter is authentic, and was received by Mr. Wallace of R.C.A. (Tr. 4603).

(4) Ex. Nos. 5060, 5061, and 5070 (R.C.A. Br., pp. 28-29):

R.C.A. identifies these exhibits as "correspondence from R.C.A." (R.C.A. Br., p. 28) and concedes their

authenticity, apparently only arguing that they are irrelevant, under R.C.A.'s construction of the contents.

However, a reading of these exhibits, in the context of the other evidence, demonstrates how R.C.A. controlled the expenditure of its advertising funds by its distributors to retailers, and the way in which retail prices were to be shown in local advertising.

Pl. Ex. for Id. No. 5061 states in part:

> "*Important Merchandising Pricing.* Pricing will be shown on leader merchandise only. Please indicate at the bottom of the dealer listing form in the space provided whether you desire Zone I or Zone II pricing of these Leader Models in your inserts."

This is clearly a direction to R.C.A. distributors as to what models will have pricing disclosed.

Pl. Ex. for Id. No. 5070 shows that advance approvals from R.C.A. were necessary for participation in the advertising subsidy program discussed in the exhibit. 5070 A-C expressly states:

> ". . . Your cooperation is necessary *in obtaining advance approvals,* rapidly preparing and submitting claims, and sending in Balance Statements (TRS 225) on time. With your cooperation, we will be able to have claims processed and credits issued in a minimum time." [Emphasis added.]

Pl. Ex. for Id. No. 5060 discloses that R.C.A. unilaterally determined the manner in which its retailer advertising subsidy programs were going to be administered.

(5) Ex. for Id. No. 5068 (R.C.A. Br., p. 30):

The *affidavit* to be signed by the retailer does not contain any references to F.T.C. guides; but to the contrary *requires* the retailer to state its prior retail prices or prevailing (retail) prices. The granting of advertising allowances is based on the receipt of such affidavits. The explanation that this mandatory requirement was solely designed to further supposed F.T.C.-approved policies is apparently R.C.A.'s theory of defense. The jury could just as well draw other conclusions, including a finding that the appellees were usurping governmental authority for their own purposes.

(6) Ex. for Id. No. 1702 (R.C.A. Br., p. 32):

This letter was written by R.C.A. Victor Distributing Corporation in Los Angeles, in response to a request to it from Manfree for product. The meaning of its phrase "we concentrate our sales efforts in the market areas where we are best facilitated to serve which are in Southern California" is a factual question. The letter also states "we have no customers in your market area". Vertical territorial restrictions cannot lawfully support a local boycott. *Girardi v. Gates Rubber Company Sales Division, Inc.*, 325 F.2d 196, 200 (9th Cir. 1963). Such vertical restraints are illegal *per se*. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 378-379 (1967).

(7) Ex. for Id. Nos. 780 and 1159 (R.C.A. Br., p. 33):

In quoting from a portion of Pl. Ex. for Id. No. 780, R.C.A. studiously avoids the paragraph which

was a basis for its offer into evidence (Tr. 4649):

> ". . . Since they are recognized as key accounts, we are asking you to make an exception in this case and accept these violations."

With knowledge that Meyer deemed Hale and R. H. Macy Co. to be "key" retail accounts in the market, R.C.A. approved the advertising subsidy claims for these retailers, *despite* "violations" of F.T.C. guidelines. Pl. Ex. for Id. No. 1159.

(8) Ex. for Id. Nos. 363, 364 and 365 (R.C.A. Br., p. 34):

It is appellants' contention (Ap. O.B., pp. 64-65, 69-71) that San Francisco Better Business Bureau's Home Furniture Advisory Committee meetings were used as a forum by co-conspirator retailer representatives to discuss discount store competition and newspaper advertising, resulting in Mr. Schreck of co-conspirator Sterling Furniture Co. seeking to have the San Francisco *News Call-Bulletin* reject U.S.E.'s advertising. These exhibits are thus relevant to R.C.A.'s defense that it had no concern with, or knowledge of, such activities in the local market.

(9) Evidence Pertaining to Policing of Spiegel Outlet Store Situation

These exhibits and testimony (R.C.A. Br., pp. 35-36) show that R.C.A. was clearly on notice that the major San Francisco retailers expected list prices to be maintained, and its continued business arrangements with Meyer points to appellee's acquiescence in such a plan. They also demonstrate the obvious

belief of Meyer that local market problems were to be brought to the attention of and discussed with R.C.A.; and that Meyer refused R.C.A.-brand televisions to Spiegel, another "price-cutter", as it did to Manfree, and undoubtedly for the same reasons with the knowledge and consent of R.C.A.

H. The trial court erred in excluding evidence against Whirlpool

(1) Pl. Ex. for Id. 5086 (W.P. Br., p. 28):

The contention that R.C.A. and Whirlpool did not have anything to do with the administration or policies of the other is unbelievable when it is shown that two directors of R.C.A. were on the Board of Directors of Whirlpool. This is proof of joint control over administration and policies.

(2) Pl. Ex. for Id. 1714 (W.P. Br., p. 28):

From this exhibit the jury could conclude there had been discussions between Whirlpool and Meyer concerning Manfree. This exhibit went directly to the issue of whether or not there was discussion and approval of Meyer selling to discount stores.

(3) Pl. Ex. for Id. 5077 (W.P. Br., p. 29):

It was prejudicial error for the court to exclude from consideration documents showing the existence of Whirlpool's dealer call reports, and the subject matters discussed between Whirlpool and Meyer about the local retail market.

I. Evidence that Frigidaire maintained suggested list prices after 1960 was improperly rejected

Frigidaire claims that Pl. Ex. for Id. Nos. 4170 and 4178 (A-C), 4178 were not properly admissible (Frig. Br., pp. 42-44). It attempts to make the identification of the author of the handwritten notes material. But Ex. No. 1470 was admittedly from the files of Lachman Bros. (Tr. 1895-1896), and it was stipulated that Pl. Ex. No. 1478 was from Redlick's records (Tr. 2267). The offer of those exhibits was on the ground that substantially the same list prices were followed, allowing the conclusion that there were discussions with Frigidaire personnel as to "list" price, a term used by a supplier. It was established that retail prices were discussed between Mr. Laird of Lachman Bros. and Mr. Shaw of Frigidaire (Tr. 1896-1897, 1902; see impeachment of Laird's testimony at Tr. 1905-1910). Whether or not Frigidaire continued to promote sales at its suggested list price was in issue, and it was a question for the jury.

J. The deposition of Arthur Alpine was erroneously excluded

The record is clear that appellees' counsel had full and complete examination of Mr. Alpine on all subject matters upon which they desired to interrogate, with the exception of claimed privileged material (R. 254-261). It was counsel for appellees who delayed an unreasonably long time in raising the issue of claimed privileged material. The deposition of Mr. Alpine should not have been excluded.

IV. THE TRIAL COURT ERRED IN ITS PRETRIAL DISCOVERY RULINGS

A. The trial court erred in not enforcing the subpoena duces tecum against Frigidaire Sales Corporation

The Frig. Br. incorrectly claims that Frigidaire agreed to comply with substantially all the items demanded in the subpoena against Frigidaire. This is completely contrary to the showing made by the appellant in moving that the court order the production of documents set forth in the subpoena (R. 309). It is further amazing that Frigidaire should claim that the ruling of Judge Sweigert supports its position as to the failure to produce documents at a deposition since the order of Judge Sweigert (R. 362-368) indicated to the defendants that there should be liberal production of documents in the litigation. Frigidaire thus avoids the issue raised in the Specification of Error, VIII.A. Frigidaire should have been required to respond to a subpoena duces tecum as to relevant and material matters and it is not an answer to say that Frigidaire subsequently produced some documents.

Rule 45 requires the production of documents at a deposition and should be enforced to provide the parties with deposition tools. The plaintiff is entitled to all tools of discovery available to it. Defendant can require showing of good cause by a motion to quash before the deposition or can respond to a motion for compliance with the subpoena. *Fifth and Walnut, Inc. v. Loew's,* 1948 Trade Cases, Para. 62,458 (per J. Rifkind) citing 2 Moore's Fed. Practice § 34.01.

B. The court erred in denying the plaintiff's motion for an order to show cause why documents should not be produced by defendant R.C.A.

Appellee RCA conveniently avoids the position it now finds itself in with respect to its refusal to produce documents at the depositions of Mr. Dan Gentile, Mr. Fred Folsom, Mr. Harold Maag and Mr. R. W. Saxon. A subpoena had been served upon Mr. Gentile on March 14, 1963 (R. 327) and the subpoena was addressed to Radio Corporation of America and/or its managing agent Dan J. Gentile. No motion to quash was made with respect to this subpoena and the defendant refused to produce documents at the above depositions (R. 333-334). R.C.A. has risked the ruling of the courts as to whether or not Mr. Gentile was a managing agent. It now ignores this evasion and argues that appellant has established no good cause for production of documents; but R.C.A. was shown to have a considerable amount of correspondence with A. H. Meyer Co. (R. 338). Its field representative, Dan Gentile, was shown to have made reports to his superiors concerning his visits to retail stores (R. 344). These documents have simply never been produced by R.C.A.

C. The court erred in denying production of documents addressed to the factory defendants, Item 15.

Whirlpool and General Electric claim that plaintiffs in effect have received the documents requested, referring the court to Items 12, 17-23 of Plaintiffs' Motion for the Production of Documents, dated June 5, 1965; but Item 12 did not refer to inter-office cor-

respondence and Item 18 was limited by the court to documents that directly or indirectly contain or reflect policy, understanding, or agreement on whether or not RCA-Whirlpool appliances should be sold to plaintiffs or any other discount store. As to R.C.A., appellees' briefs clearly show that the court did not grant this order despite the fact that R.C.A. had no objection to the order being granted (R. 425). Defendants Maytag Co., and General Motors Corp., did not file affidavits in opposition to the motion, but merely filed memoranda claiming they did not have such documents. With respect to Borg-Warner see heading F. below.

D. The Court erred in denying Item 15 of Plaintiff's Motion for the Production of Documents addressed to the distributor defendants.

California Electric Supply has not responded to this specification of error (Cal. El. Br., 36). Maytag West Coast Co. claims that no such documents exist, but the fact remains that no affidavit was made to support this statement. The same is true with respect to Frigidaire Sales Corporation and General Electric Corporation.

E. The Court erred in refusing to require appellees General Electric, Whirlpool, and RCA to answer Questions 2, 3, 4, 5 and 6 of Plaintiff's Interrogatories, and in refusing to require said appellees to answer Questions 1, 2, 3 and 6 of Plaintiff's Second Interrogatories.

These interrogatories were designed to obtain information of the existence of memoranda concerning conversations about appellants. Thus, by the Court's

ruling, appellees were not required to produce the same type of reports which appellants previously were required to produce (R. 270-272). The procedure outlined by Judge Weigel in his earlier Order (Id.) allowed *in camera* inspection of claimed privileged materials of this nature. This procedure was not adopted by Judge Zirpoli, whose orders in effect denied appellants' attempts to obtain appropriate foundation for the production of memoranda of conversations by defendants about the parties to the litigation (R. 791-792; 972). It is repectfully urged that good cause exists when it is shown that discovery was ordered to proceed along defined lines as to certain types of evidence, as to one of the parties. When such a definitive order is made, the other parties should be required to produce the same type of materials.

F. The Court denied production of documents described under Items 20, 22(c)-(e), and 27(f) of Plaintiff's Motion for the Production of Documents.

Maytag Corporation, R.C.A. and General Electric do not cite any corporate affidavits in opposition to this motion. Whirlpool claims the plaintiffs received, in substance, the documents requested in Items 22(c) and 22(d) and refer the Court to Items 18 and 19 of appellants' first Motion for the Production of Documents. But this refers the Court to an order which used the terminology "policy, understanding, or agreement." Whirlpool also claims that an order requiring the production of a speech is a sufficient response to Item 27(f). This, of course, cannot be sustained. Likewise, General Electric does not cite its responses to

this Motion for the Production of Documents, and instead refers to affidavits filed in response to an earlier motion. The position of Borg-Warner is that the documents requested were produced pursuant to deposition agreements, but the Court did not order the production of the documents referred to in the above items by Borg-Warner. Borg-Warner took the position that it did not control documents of a 100% subsidiary whose president was under its employ, Mr. Judson Sayre. (See affidavit of R. Murphy, R. 551. Compare R. 551 with Tr. 2474-2532.)

In summary, therefore, the appellants were denied definitive pre-trial orders allowing them production of documents referring to them, memoranda concerning the significant conversations involved in the litigation, and reports made at the request of counsel although defendants had the right to *in camera* inspection of similar documents of appellants. Discovery in this case was not equitable and was prejudicial to the appellants.

V. THE TRIAL COURT PERMITTED PREJUDICIAL ERROR IN NOT PERMITTING APPELLANTS TO INTRODUCE EVIDENCE OR OBTAIN JUDGMENT BASED ON DENFENDANT'S ENTRY INTO VERTICAL CONSPIRACIES TO RESTRAIN AND MONOPOLIZE INTERSTATE TRADE AND COMMERCE, AS ALLEGED IN THE COMPLAINT.

Appellees seem to argue that the court did allow consideration of appellants' contention that they were injured by single horizontal conspiracies in violation of Section 1 or 2 of the Sherman Act. We urge that the Pre-Trial Order limited the case to prevent such

a showing, and certainly the trial court's decision did not view the case as involving separate vertical conspiracies. But appellants were entitled to prove all violations of the antitrust laws. The rule is now certain under the Supreme Court's recent opinion in *Perma Life Mufflers, Inc., et al. v. International Parts Corp.,* ATRR, No. 361, X-15, that a plaintiff is entitled to a judgment based on any violation of the antitrust laws which injure him. (Citing Rule 8(f) Fed. Rules Civ. P.).

VI. ITEMS OF COSTS IMPROPERLY TAXED.

The appellees who discuss the cost judgment (R.C.A. Br., pp. 42-43; W.P. Br., pp. 49-50; Frig. Br., pp. 60-64; Cal. El. Br., p. 36) do not argue against (or even mention) the strong policy statement as to the discretionary allowance of taxable costs in federal cases set forth by the Supreme Court in *Farmer v. Arabian American Oil Co.,* 379 U.S. 227, 235 (1964). (See Ap. O.B., p. 178).

Farmer points out that proper allowance of costs for copies of daily trial transcripts is strictly based on *necessity, not* the convenience of counsel (379 U.S. 227 at 233-234). While claiming that two complete sets of trial transcripts were "essential" (Frig. Br., p. 62), appellees strangely offer no explanation or reason in fact why two separate sets were so essential. The Supreme Court upheld the District Court's disallowance of *any* costs for daily transcripts, noting that the case was "not . . . complicated" *(Id.* at p.

234). Calling the present matter "complicated" does not open the door to all costs appellees saw fit to incur for their own convenience. As in *Farmer,* there was no need for the jury to read trial transcripts, and appellees had no need for transcripts to draw proposed finding *(ibid.);* their need for transcripts in cross-examination, or to prepare a brief during trial (referring to testimony) was, as shown by the record, very limited. At the most, appellants should be taxed the costs of *one* set. See *Perlman v. Feldman,* 116 F. Supp. 102, 109 (D. Conn. 1953), relied upon in *Independent Iron Works, Inc. v. United States Steel Corp.,* 322 F.2d 656, 676-679 (9th Cir. 1963).

As to transcripts of the non-evidentiary pretrial court hearings, R.C.A. advances no argument supporting the taxing of costs of such transcripts (R.C.A. Br., p. 42). Frigidaire asserts that such transcripts were necessary for preparation of the Pretrial Order (Frig. Br., p. 63). Yet, an inspection of that Order reveals no reference to pre-trial hearing *transcripts;* the relevant Orders of the trial court following pretrial hearings were prepared and signed before such transcripts were printed by the reporters. The statement by Judge Hincks in *Perlman v. Feldman, supra* (116 F. Supp. 102 at 112) disallowing such costs (Ap. O.B., pp. 180-181), adequately demonstrates why taxing these cost items was an abuse of discretion.

This Court in the *Independent Iron Works, Inc.,* case *(supra),* so strongly relied upon by appellees, notes that costs of depositions taken by defendants (appellees) are properly taxable *only* if *necessarily*

used at trial (as for impeachment) and not otherwise (322 F.2d 656 at 678). And, in the same opinion, it was noted that costs of depositions taken by plaintiffs (appellants) of officers of adverse parties who may be witnesses were taxable, but not the costs of other depositions taken by appellants *(Id.* at pp. 678-679). And, that decision was made without a transcript of the cost hearing, and before the Supreme Court's definitive policy statement on taxable costs in *Farmer, supra.* Thus, as pointed out by appellants (Ap. O.B., pp. 179-180), taxing costs for deposition transcript copies of other than those listed on page 5 of appellants' Objections to Defendants' Bills of Costs (R. 2042, 2046) was an abuse of discretion, and should be disallowed. In support of taxing such costs, Frigidaire argues that the trial court "adopted correct standards" including costs of copies of depositions for "potential impeachment of witnesses" (Frig. Br., p. 62). Then it cites the *Independent Iron Works* opinion for authority that taxing such costs was proper where the depositions taken by defendants "*had* been used" for impeachment. *(Ibid.)* [Emphasis added.] Here, as noted, appellees' use of depositions for impeachment was very limited (Ap. O.B., p. 180).

Taxing the costs of reproducing all of appellants' prospective exhibits was also an abuse of discretion, as previously delineated (Ap. O.B., p. 180). *All* exhibits were lodged in, and remained in court from a time before trial, available to all appellees at any time, contrary to what Frigidaire attempts to imply

(Frig. Br., pp. 63-64). Copies to take back to attorneys' offices would be purely a convenience.

As to the taxation of travel costs for Mr. Saxon of R.C.A. to attend his deposition, including travel outside the District and in excess of 100 miles, R.C.A. contends that the *Farmer* decision expressly authorized such costs (R.C.A. Br., p. 43). It does not. The Supreme Court in *Farmer* leaves the taxing of such costs to the District Court, *but* (consonant with its general expression of policy in that case) states with respect to the 100-mile limitation rule:

> ". . . that rule, we think, is a *proper and necessary consideration* in exercising discretion in this field." [Emphasis added.] (379 U.S. 227 at 234).

Moylan v. AMF Overseas Corporation, 354 F.2d 825 (9th Cir. 1965) cited by R.C.A. (R.C.A. Br., p. 43), involved a witness who was a *party,* who was subpoenaed to testify at trial by appellants, and who expressly was *not* found to have been an "adverse witness" (354 F.2d 825 at 830). Under these circumstances, this Court found taxing of costs of travel for over 100 miles not to be an abuse of discretion. But *Moylan* does not overrule *Kemart Corp v. Printing Arts Research Laboratories, Inc.,* 232 F.2d 897, 904 (9th Cir. 1956), in light of the guidelines expressed in *Farmer* (above), to the effect that in circumstances like that pertaining to Mr. Saxon, taxable costs should be limited to 100 miles or actual mileage traveled in the District up to 100 miles, whichever is greater. It was an abuse of discretion to tax such costs in excess of such limitations.

CONCLUSION

It is respectfully submitted that the judgment below as to all appellees should be reversed and this case remanded for trial.

Dated, San Francisco, California,
June 27, 1968.

Respectfully submitted,
MAXWELL KEITH,
EDWIN C. SHIVER,
By MAXWELL KEITH,
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FELDMAN, WALDMAN & KLINE,
Of Counsel.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Appellants' Reply Brief is in full compliance with those rules.

Dated, San Francisco, California,
June 27, 1968.

MAXWELL KEITH,
Attorney for Appellants.

(Appendix A Follows)

Appendix A

Appendix A

ANALYSIS OF MAYTAG EXHIBITS CLAIMED TO SHOW RETAIL PRICE COMPETITION IN MAYTAG PRODUCTS WHERE MODEL NUMBER IS IDENTIFIED IN ADVERTISEMENT

Model No.	Exhibit No.	Retailer	Date	Price
123	DMT 13043	Hales	3/12/59	219.95
123	DMT 13044	Hales	3/19/59	219.95
123	DMT 13045	Hales	3/23/59	219.95
123	DMT 13045A	Hales	3/30/59	219.95
123	DMT 13046	Hales	4/2/59	219.95
123	DMT 13047	Hales	6/11/59	209.95
123	DMT 13049	Hales	8/6/59	209.95
123	DMT 13051	Hales	4/9/59	209.95
126	13039	Cherin's	7/30/59	279.95
126	13092	Young Bros.	7/17/59	277.70
126	13050	Hales	7/9/59	279.95
126	13053	Hales	9/3/59	278.00
126	13054	Hales	9/14/59	278.00